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Case No. 3:16-cv-00665-HDM-CLB

ORDER

V.

Respondents.

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1 counts of battery with intent to commit sexual assault. (Ex. 46).¹
2 The charges arose from two incidents that took place on July 31,
3 2010. (Ex. 4). Howard was accused of first kidnapping and sexually
4 assaulting Marilyn S. and then kidnapping and attempting to
5 sexually assault Michele C. (*Id.*) A third woman, Heather, alleged
6 that Howard had also followed her around Virginia Lake for upwards
7 of an hour that same day. Howard was not charged with any crimes
8 in connection with Heather.

9 On June 6, 2011, trial commenced. (See Ex. 132). The first
10 victim, Marilyn, testified that Howard approached her in the
11 parking lot of the Ponderosa Hotel on her way to the Discount
12 Liquor Store, at around 8 a.m. on July 31, 2010. (*Id.* at 214, 222-
13 23). Howard, who was with another man, asked Marilyn to go with
14 him; Marilyn said no and hurried over to the store. (*Id.* at 222-
15 25, 228-229). As Marilyn stood outside the liquor store, trying to
16 see if the owner, who had previously banned her, was inside, Howard
17 pulled into the parking lot and parked in front of the store. (*Id.*
18 at 230-31). The man that had been with him got out of the car and
19 left. (*Id.* at 232-33; 239).

20 Howard got out and pushed Marilyn toward his car. (*Id.* at
21 233-35). She told him to leave her alone and go away, but Howard
22 continued to push. (*Id.* at 235-36). Once he had Marilyn in the
23 car, Howard shut the door, ran to the driver's side, and drove
24 back to the Ponderosa parking lot. (*Id.* at 241, 244).

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27 ¹ The exhibits cited in this order, comprising the relevant state court
28 record, are located at ECF Nos. 30-33 & 51. Petitioner also filed
exhibits, located at ECF Nos. 16 and 59, which the court does not cite
in this order.

1 While in the parking lot, Howard pulled his pants down and
2 crawled on top of Marilyn, as Marilyn struggled and tried to push
3 him away. (*Id.* at 244-45, 248-49). Howard told Marilyn that he was
4 going to penetrate her, to call him "daddy," and that he wasn't
5 going to share her with anyone. (*Id.* at 251-52). He unzipped her
6 pants, began rubbing her vagina, and told her to grab his penis.
7 (*Id.* at 252-53). Although Marilyn complied, she did so by squeezing
8 hard, but the effort, intended to get Howard off of her, did not
9 work. (*Id.* at 252-54). Eventually, however, Howard did get off.
10 (*Id.* at 253-55). Marilyn attempted again to get out of the car,
11 but Howard pulled her back in by her leg, clothing, and hair. (*Id.*
12 at 245-46; 254). He then drove off. (*Id.* at 255).

13 As they drove, Marilyn asked Howard to take her to a nearby
14 gas station, where she knew other people would be and where she
15 planned to call 911. (*Id.* at 233). On the way there, Howard
16 continued to pull her hair and her clothes. (*Id.* at 256). Once
17 there, Howard parked in the back of the station, where he again
18 pulled on Marilyn's hair and forced her head down toward his lap,
19 this time sticking his penis in her mouth. (*Id.* at 257, 260-61).

20 Marilyn continued to fight and was eventually able to get out
21 of the car and into the gas station, where she called the police
22 from the store's phone. (*Id.* at 261-62; Ex. 133 (Tr. 20)). Howard
23 drove to the front of the store, got out of the car, and opened
24 the door to the store. (Ex. 133 (Tr. 23)). He did not come inside
25 but instead stood in the doorway. (*Id.* at 23). After standing there
26 for a few seconds, he left. (*Id.* at 24).

27 According to the gas station clerk, Rajeev Verma, Marilyn
28 appeared scared and said she needed help and that someone was

1 trying to rape her. (Ex. 133 (Tr. 77-80)). When Howard was in the
2 doorway, he was trying to talk to Marilyn, apparently asking her
3 to come outside, but Marilyn did not appear to want to go with
4 him. (*Id.* at 80-83). Verma described Howard as yelling and unkind,
5 describing him as "kind of rude and kind of like he was mad on her
6 or something." (*Id.* at 97).

7 The officer who responded to Marilyn's 911 call described her
8 as calm when he was talking to her. (Ex. 134 (Tr. 80)). Another
9 officer said that during his interview with Marilyn, it seemed
10 like the timeline of events was much longer than the details she
11 was giving. (*Id.* at 144-45). And the man who was with Howard in
12 the Ponderosa parking lot when Howard and Marilyn first met
13 testified that he observed Howard and a woman fitting Marilyn's
14 description engaged in playful, almost flirting, conversation for
15 a long time. (Ex. 135 (Tr. 129-33)). That man thought there was
16 reciprocal interest based on the way Howard and the woman were
17 talking. (*Id.* at 148-50).

18 The second victim, Michele, testified that she was walking
19 home from her friend's house in the area of Kuenzli Lane in Reno
20 on July 31, 2010, at around 10 a.m. when Howard pulled up into a
21 driveway, blocking her path, and told her he wanted to give her
22 the time of her life. (Ex. 133 (Tr. 104-08, 111)). Michele
23 responded, "no thank you, I'm not interested in that, but you can
24 give me a ride if that's what you want to do." (*Id.* at 111-12).
25 Howard replied, "Okay get in." (Ex. 134 (Tr. 24)).

26 Michele pointed Howard in the direction she wanted to go, but
27 he went the opposite way. (Ex. 133 (Tr. 112)). His words became
28 sexually aggressive. (*Id.*) Michele told Howard he was going the

1 wrong way, to which Howard responded that he was going to give her
2 the time of her life before he would let go. (*Id.* at 113). As
3 Michele began looking for a way out of the car, Howard reached
4 over and began to play with her hair. (*Id.* at 114). Michele told
5 Howard to stop the car and instead he sped up. (*Id.*) Howard reached
6 over and pulled the scrunchie out of Michele's hair; Michele got
7 angry and grabbed it back. (*Id.* at 115-16). Howard became more
8 physical and forceful, reaching over, twisting Michele's hair, and
9 pulling her head down inches away from his groin. (*Id.* at 116).
10 Michele was able to push herself back up. (*Id.* at 118).

11 All the time, Howard continued to drive. (*Id.* at 117). Howard
12 did not stop at any stop signs, and there were no red lights. (*Id.*
13 at 119-20). As they approached a stop sign and Howard slowed - but
14 didn't stop -- Michele opened the door and jumped out. (*Id.* at
15 119-2). Howard grabbed Michele's hair and sped up, but Michele was
16 already halfway out, and after being dragged some distance with
17 her legs out the door, she eventually fell out of the car, landing
18 on her chin. (*Id.* at 121-22, 125-26). Badly injured, Michele
19 approached a cab driver and asked him to take her to her hotel;
20 the driver refused, telling Michele to call 911. (*Id.* at 126, 129).
21 Michele then went to a nearby minimart and asked them to call 911;
22 the clerk refused and told Michele to leave. (*Id.* at 129). Sachin
23 Verma, who was in the store at the time, offered to call 911 on
24 his cell for Michele. (*Id.* at 131; (Ex. 134 (Tr. 34-35))). Sachin
25 Verma described Michele's demeanor as frantic, scared and crying.
26 (Ex. 134 (Tr. 34-35))).

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1 Heather² also testified. She told the jury that on the morning
2 of July 31, 2010, she was visibly pregnant and walking her two-
3 year-old daughter around Virginia Lake when Howard pulled up next
4 to her in his car and asked her to come talk with him. When she
5 refused, explaining she was pregnant, with her daughter, and had
6 a boyfriend at home, he continued to drive alongside her for at
7 least five or ten minutes more. (Ex. 135 (Tr. 96-105)).
8 Eventually, Heather got to the park and Howard drove away. (*Id.* at
9 106-09).

10 After letting her daughter play for 30-45 minutes, Heather
11 began to walk back the way she had come. When she reached the
12 parking lot, however, Howard was there, and as she passed near him
13 he again started talking to her. (*Id.* at 109-10). Heather told
14 Howard he was scaring her, and Howard replied, "I don't want to
15 scare you," and drove off. (*Id.* at 110). But again Heather ran
16 into Howard, this time near the bathrooms. When she again told him
17 he was scaring her, he left in his car momentarily but returned,
18 pulling up next to her and saying, "Well if you were a real bitch,
19 you would sit and at least talk with me." (*Id.* at 111-13, 115).
20 Heather put her head down and continued to walk; Howard continued
21 to follow her. (*Id.* at 114). All told, Howard followed Heather for
22 about an hour. Howard left only after Heather encountered a couple
23 that was willing to help her. (*Id.* at 116-17).

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26 ² Before the trial began, the court had ruled Heather's testimony was
27 not admissible but warned the door to it could be opened. Following
28 statements by defense counsel in opening and in questioning Detective
Doser, the trial court ruled the door had been opened and Heather could
testify.

1 Marilyn, Michele and Rajeev Verma all identified Howard as
2 the man in question during trial. (Ex. 132 at 222; Exhibit 133 at
3 81; Exhibit 133 at 106). In addition, other evidence connected
4 Howard to the crimes. The license plate number of the vehicle used
5 in Marilyn's assault matched a vehicle belonging to Howard's
6 daughter, and Howard could not be excluded as the source of DNA
7 collected from Marilyn's mouth. (Ex. 134 (Tr. 60, 68-69); Ex. 135
8 (Tr. 84-85)). When interviewed by Detective Doser, Howard lied
9 about where he had been the morning of July 31, 2010, and denied
10 engaging in any sexual contact that day. (Ex. 134 (Tr. 116-19,
11 147)).

12 The jury found Howard guilty on all counts. (Ex. 46). Howard
13 moved to set aside the verdict or, in the alternative, for a new
14 trial; the motion was denied. (Exs. 49 & 137 at 3-4). Howard was
15 sentenced and judgment of conviction entered. (Exs. 56 & 137).

16 On appeal, the Nevada Supreme Court affirmed. (Exs. 61, 72 &
17 80). Howard thereafter pursued a state postconviction petition,
18 which the trial court denied. (Exs. 83, 89 & 99). The Nevada
19 Supreme Court affirmed. (Ex. 111).

20 Howard now pursues his claims via the instant federal habeas
21 petition pursuant to 28 U.S.C. § 2254. The claims therein are
22 before this court for review on the merits.

23 **II. Standard**

24 28 U.S.C. § 2254(d) provides the legal standards for this
25 Court's consideration of the merits of the petition in this case:

26 An application for a writ of habeas corpus on behalf of
27 a person in custody pursuant to the judgment of a State
28 court shall not be granted with respect to any claim
that was adjudicated on the merits in State court
proceedings unless the adjudication of the claim -

1 (1) resulted in a decision that was contrary to, or
2 involved an unreasonable application of, clearly
3 established Federal law, as determined by the
Supreme Court of the United States; or

4 (2) resulted in a decision that was based on an
5 unreasonable determination of the facts in light of
6 the evidence presented in the State court
7 proceeding.

8 AEDPA "modified a federal habeas court's role in reviewing
9 state prisoner applications in order to prevent federal habeas
10 'retrials' and to ensure that state-court convictions are given
11 effect to the extent possible under law." *Bell v. Cone*, 535 U.S.
12 685, 693-694 (2002). This court's ability to grant a writ is to
13 cases where "there is no possibility fairminded jurists could
14 disagree that the state court's decision conflicts with [Supreme
15 Court] precedents." *Harrington v. Richter*, 562 U.S. 86, 102 (2011).
16 The Supreme Court has emphasized "that even a strong case for
17 relief does not mean the state court's contrary conclusion was
18 unreasonable." *Id.* (citing *Lockyer v. Andrade*, 538 U.S. 63, 75
19 (2003)); see also *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011)
20 (describing the AEDPA standard as "a difficult to meet and highly
21 deferential standard for evaluating state-court rulings, which
22 demands that state-court decisions be given the benefit of the
23 doubt") (internal quotation marks and citations omitted.)

24 A state court decision is contrary to clearly established
25 Supreme Court precedent, within the meaning of 28 U.S.C. § 2254,
26 "if the state court applies a rule that contradicts the governing
27 law set forth in [the Supreme Court's] cases" or "if the state
28 court confronts a set of facts that are materially
indistinguishable from a decision of [the Supreme Court] and

1 nevertheless arrives at a result different from [the Supreme
2 Court's] precedent." *Andrade*, 538 U.S. 63 (quoting *Williams v.*
3 *Taylor*, 529 U.S. 362, 405-06 (2000), and citing *Bell*, 535 U.S. at
4 694).

5 A state court decision is an unreasonable application of
6 clearly established Supreme Court precedent, within the meaning of
7 28 U.S.C. § 2254(d), "if the state court identifies the correct
8 governing legal principle from [the Supreme Court's] decisions but
9 unreasonably applies that principle to the facts of the prisoner's
10 case." *Andrade*, 538 U.S. at 74 (quoting *Williams*, 529 U.S. at 413).
11 The "unreasonable application" clause requires the state court
12 decision to be more than incorrect or erroneous; the state court's
13 application of clearly established law must be objectively
14 unreasonable. *Id.* (quoting *Williams*, 529 U.S. at 409).

15 To the extent that the state court's factual findings are
16 challenged, the "unreasonable determination of fact" clause of §
17 2254(d)(2) controls on federal habeas review. *E.g.*, *Lambert v.*
18 *Blodgett*, 393 F.3d 943, 972 (9th Cir. 2004). This clause requires
19 that the federal courts "must be particularly deferential" to state
20 court factual determinations. *Id.* The governing standard is not
21 satisfied by a showing merely that the state court finding was
22 "clearly erroneous." *Id.* at 973. Rather, AEDPA requires
23 substantially more deference:

24 [I]n concluding that a state-court finding is
25 unsupported by substantial evidence in the state-court
26 record, it is not enough that we would reverse in similar
27 circumstances if this were an appeal from a district
28 court decision. Rather, we must be convinced that an
appellate panel, applying the normal standards of
appellate review, could not reasonably conclude that the
finding is supported by the record.

1 *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004); see also
2 *Lambert*, 393 F.3d at 972.

3 Under 28 U.S.C. § 2254(e)(1), state court factual findings
4 are presumed to be correct unless rebutted by clear and convincing
5 evidence. The petitioner bears the burden of proving by a
6 preponderance of the evidence that he is entitled to habeas relief.
7 *Cullen*, 563 U.S. at 181. The state courts' decisions on the merits
8 are entitled to deference under AEDPA and may not be disturbed
9 unless they were ones "with which no fairminded jurist could
10 agree." *Davis v. Ayala*, - U.S. -, 135 S. Ct. 2187, 2208 (2015).

11 **III. Analysis**

12 **A. Ground One**

13 In Ground One, Howard asserts that his "trial attorney
14 provided ineffective assistance of counsel by opening the door to"
15 Heather's testimony. (ECF No. 21 at 13).

16 Ineffective assistance of counsel claims are governed by
17 *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*,
18 a petitioner must satisfy two prongs to obtain habeas relief—
19 deficient performance by counsel and prejudice. 466 U.S. at 687.
20 With respect to the performance prong, a petitioner must carry the
21 burden of demonstrating that his counsel's performance was so
22 deficient that it fell below an "objective standard of
23 reasonableness." *Id.* at 688. "'Judicial scrutiny of counsel's
24 performance must be highly deferential,' and 'a court must indulge
25 a strong presumption that counsel's conduct falls within the wide
26 range of reasonable professional assistance.'" *Knowles v.*
27 *Mirzayance*, 556 U.S. 111, 124 (2009) (citation omitted). In
28 assessing prejudice, the court "must ask if the defendant has met

1 the burden of showing that the decision reached would reasonably
2 likely have been different absent [counsel's] errors." *Strickland*,
3 466 U.S. at 696.

4 The State moved to admit Heather's testimony prior to trial.
5 (Ex. 7). At a hearing, the trial court ruled Heather's testimony
6 was inadmissible to prove a common plan or scheme but warned that
7 the door could be opened depending on the questions defendant asked
8 or evidence he introduced during trial. (Ex. 126). Howard's
9 attorneys for trial -- Marc Picker and Angela Lightner - did not
10 assume representation of Howard until after this hearing. (See
11 *id.*; Ex. 26).

12 In opening statements during trial, Lightner argued that
13 Howard believed the women were open to having fun with him and
14 that prostitution commonly occurs in the area where the crimes
15 allegedly took place. (Ex. 132 (Tr. 207)). Then, while questioning
16 Detective Doser, Picker asked the following:

17 Q: Okay. Because you said to Mr. Howard, "Oh, it happens
18 all the time. Guys pick up girls on Virginia Street all
the time." Is that a true statement?

19 A. We certainly look at alternative hypotheses, yes.

20

21 Q. How about the statement, "Sometimes it's a
22 misunderstanding, a business deal gone awry. And you're
23 gonna sit here and tell me there aren't prostitutes in
the city, man, 'cuz there is." That part's true, right?
24 You know there's prostitutes in the city and on South
Virginia Street, right?

25 A. Yes.

26

27 Q. Is picking up a prostitute in Washoe County a crime,
or in the city of Reno? . . .

28 A. Yes. It's against the law.

1 Q. Okay. So if you were accusing somebody of picking up
2 a prostitute, they might deny it?

3 (Ex. 134 (Tr. 150, 152, 156-57)). The prosecutor objected to the
4 last statement, and the objection was sustained.

5 In response to these questions, the State moved to introduce
6 Heather's testimony. It argued that Howard had opened the door by
7 "bringing up the defense that he believed that these women were
8 prostitutes and that his only mistake was committing a crime of
9 picking up a prostitute versus picking up these women and
10 assaulting them." (Ex. 134 (Tr. 182)). The State argued that the
11 fact Heather was "pregnant and pushing her baby around the lake is
12 indicative that she's not a prostitute." (*Id.* at 183). Although
13 defense counsel argued that he was merely repeating Doser's own
14 words, the trial court ultimately ruled Heather's testimony
15 admissible as to defendant's intent, in part because the defense
16 had suggested in opening that Howard believed the women were
17 prostitutes. (*Id.*; Ex. 135 (Tr. 55-56)).

18 Defense counsel immediately moved for a mistrial on the basis
19 of ineffective assistance of counsel. When the court noted it
20 seemed that counsel had strategic reasons for its questions,
21 counsel objected, stating:

22 It was a misreading on our part. Since we didn't do the
23 hearing [at which the court warned defense might open
24 the door to Heather's testimony], we didn't properly
25 understand the basis and where you're coming from, so
quite frankly, we've screwed this trial up and I don't
think there's a way around it.

26 (*Id.* at 56). The court denied the motion. (*Id.* at 56-57). But
27 before Heather testified, it issued a limiting instruction,
28 advising the jury that it was

1 about to hear evidence that the defendant committed
2 other acts not charged here. You may consider this
3 evidence only for its bearing, if any, on the question
4 of the defendant's intent or absence of mistake and for
5 no other purpose. You may not consider this evidence as
6 evidence of guilt of the crimes for which the defendant
7 is now on trial.

8 (Ex. 135 (Tr. 96)).

9 The Nevada Supreme Court addressed Howard's claim that
10 counsel was ineffective for opening the door to Heather's testimony
11 as follows:

12 We conclude that the district court did not err in
13 denying this claim without an evidentiary hearing. On
14 direct appeal, this court concluded that, even if the
15 prior bad act evidence was erroneously admitted at
16 trial, the admission was harmless in light of the other
17 evidence. . . . Thus, the district court properly found
18 that Howard could not demonstrate a reasonable
19 probability of a different outcome at trial but for trial
20 counsel's opening the door to this evidence. Because
21 Howard's claim of ineffective assistance failed on the
22 prejudice prong, he was not entitled to an evidentiary
23 hearing. . . .

24 (Ex. 111 at 1-2). On direct appeal, the Nevada Supreme Court had
25 held that the admission of Heather's testimony, even if improper,
26 "would amount to harmless error, since both Marilyn and Michele
27 provided sufficient credible evidence to support Howard's
28 convictions." (Ex. 80 at 11). The court also noted, in another
context, that the evidence supporting Howard's conviction was
"overwhelming." (*Id.* at 13).

Howard first argues that the Nevada Supreme Court's finding
of no prejudice should not be entitled to deference because it
applied the incorrect standard. Specifically, although the court
purported to find no reasonable probability of a different outcome
absent Heather's testimony, it did so on the basis of its direct
appeal finding that introduction of Heather's testimony, if error,

1 was harmless, because Marilyn and Michele provided "sufficient
2 credible evidence to support Howard's conviction." Thus, Howard
3 argues, Nevada Supreme Court's holding of no prejudice was
4 predicated on a "sufficiency of the evidence" standard, a standard
5 much lower and easier for the State to meet than the applicable
6 *Strickland* standard. Therefore, Howard argues, the state courts
7 applied the wrong legal standard and their determination is not
8 entitled to deference.

9 The court is not persuaded. There is no indication that the
10 Nevada Supreme Court's use of the words "sufficient evidence" meant
11 that it was applying a sufficiency of the evidence standard to
12 determine whether there was harmless error -- particularly where,
13 just above, it had cited *Tavares v. State* for the harmless error
14 standard. *Tavares* dictates that an error is harmless unless it had
15 a "substantial and injurious effect on the jury's verdict." (See
16 Ex. 80 at 9 (citing *Tavares v. State*, 30 P.3d 1128, 1132 (Nev.
17 2001))). And there is no indication that by referring back to this
18 finding, while expressly citing the applicable *Strickland*
19 standard, that the Nevada Supreme Court was applying a sufficiency
20 of the evidence standard. The court therefore finds that the state
21 courts applied the appropriate standard to the prejudice
22 determination and that the state court finding is therefore
23 entitled to deference.

24 Turning to the question of whether the state courts were
25 objectively reasonable in finding no prejudice from Heather's
26 testimony, Howard argues that Marilyn and Michele's testimonies
27 were so weak that there is a reasonable probability the jury would
28 not have convicted in the absence of Heather's credible and very

1 inflammatory testimony. Respondents argue that Heather's testimony
2 was relatively innocuous compared to the far more violent and
3 inflammatory accounts of Marilyn and Michele.

4 Heather's testimony undoubtedly cast Howard in a negative
5 light. She testified that Howard persistently pestered her, a
6 visibly pregnant woman with her toddler child, for more than an
7 hour.³ Nevertheless, Marilyn and Michele's testimonies both
8 detailed physical sexual violence over prolonged periods of time,
9 by way of forced abduction and in the face of clear protest by
10 both women. It would have been reasonable for the state courts to
11 conclude that, as such, the testimony of the victims was far more
12 inflammatory than Heather's testimony.

13 Further, the testimonies of the victims were not as weak as
14 Howard suggests.

15 With respect to Michele's testimony, Howard focuses on the
16 fact that it began with Michele making a questionable decision -
17 to get into the car with Howard after he had propositioned her for
18 sex. While a decision that many would not have made, it does not
19 render Michele's account of Howard's actions unbelievable. Howard
20 can point to little else inconsistent or unbelievable about
21 Michele's account, other than the fact that when Howard forced her
22 head to his groin she could not remember if his penis was exposed.

23
24
25 ³ As an example of the inflammatory nature of Heather's testimony, Howard
26 highlights an instance in which Heather appeared to break down during
27 her testimony. (See Ex. 135 at 106-07). Respondents argue that, in
28 context, Heather's breakdown is more likely attributable to a court
admonishment than to her own testimony. The court would agree - or at
the least it would not have been unreasonable for the state courts to
interpret the exchange in this way.

1 It is not reasonably likely that Michele's failure to remember
2 this detail would have caused a jury to doubt her testimony.

3 Most of Howard's attack on Marilyn's testimony is also without
4 merit. While it is true that Marilyn omitted details from her
5 various accounts, that does not necessarily indicate she was lying.
6 Omitting details is altogether different from providing
7 inconsistent details, and Marilyn's testimony included the former,
8 not the latter. Additionally, Marilyn testified that she had mental
9 health issues and problems communicating; it is reasonable to
10 expect that someone with these limitations who just underwent a
11 traumatic event might not remember to share every detail each time
12 she tells the story.

13 In addition, Howard asserts Marilyn's version of events could
14 not have been believed because her actions did not make sense. In
15 particular, Howard makes much of the fact that Marilyn was going
16 to a liquor store at 8 a.m. despite professing to not drinking
17 alcohol, not intending to purchase alcohol, and to being
18 blacklisted at the store. He also makes much of her choice to call
19 911 from a gas station instead of the cell phone in her pocket.
20 Both of these decisions, however, were reasonable as a matter of
21 common sense and based on testimony at trial.

22 Marilyn testified that she was planning to enter the liquor
23 store only if the man who had expelled her was not there. While
24 she could not state what she was planning to buy, other evidence
25 at trial - including from defendant's own witness⁴ - suggested that
26 the liquor store carried items other than alcohol. And there is no
27 indication that there were other businesses nearby from which

28 ⁴ Ex. 135 (Tr. 129-33)).

1 Marilyn could have obtained whatever it was she was after.
2 Marilyn's decision to call 911 from a gas station also made sense.
3 Rather than attempting a call from within the car, in a position
4 in which Howard could have stopped the call or hurt her even more,
5 she chose to be brought to a place of safety, around other people,
6 before calling 911. This was a reasonable choice on her part.

7 Howard also asserts that it is improbable that Howard abducted
8 Marilyn or that Marilyn failed to call for help. Howard notes that
9 the abduction supposedly occurred on Virginia Street, which he
10 describes as a major thoroughfare near downtown Reno where
11 "presumably" people would be walking. However, Howard provides no
12 evidence to support his presumption that, at 8 a.m. on a Saturday
13 morning, there would have been such a number of people walking on
14 that particular stretch of Virginia Street that either an abduction
15 could not have occurred or a call for help would have been heard.
16 Nor was any such evidence presented at trial.

17 Finally, the fact Howard did not ejaculate while assaulting
18 Marilyn is not a fact of any significance. There are a plethora of
19 reasons Howard might have stopped before ejaculating that are
20 consistent with him assaulting Marilyn against her will.

21 Howard raises a number of additional points about Marilyn's
22 testimony and argues that Heather's testimony unduly corroborated
23 Marilyn's questionable account. However, even considering these
24 additional points, there is no reasonable probability that the
25 outcome of the proceedings would have been different had Heather
26 not testified.

27 First, the trial court issued a proper limiting instruction,
28 which restrained the impact of Heather's testimony to the issue of

1 Howard's intent and absence of mistake. In light of the limiting
2 instruction, there is not a reasonable probability of a different
3 outcome had Heather not testified.

4 Second, Howard does not challenge the joinder of Marilyn's
5 and Michele's charges. Because the cases were tried together, the
6 evidence that was adduced included both Michele's testimony and
7 Marilyn's testimony. Michele presented an account that was in many
8 ways similar to Marilyn's account, and the women had no connection
9 to each other or apparent motivation to be untruthful. This,
10 considered with Howard's denial of being with either woman and all
11 the other evidence that did not include Heather's testimony, was
12 overwhelming evidence of Howard's guilt. It was not objectively
13 unreasonable for the state courts to conclude that the outcome of
14 the proceedings would not have been different had Heather not
15 testified.

16 Howard is not entitled to relief on Ground One of the
17 petition.

18 **B. Ground Two**

19 In Ground Two of the petition, Howard asserts that the trial
20 court violated his rights to due process and a fair trial by
21 admitting Heather's testimony. (ECF No. 21 at 21).

22 "[I]t is not the province of the federal habeas court to
23 reexamine state court determinations on state-law questions. In
24 conducting habeas review, a federal court is limited to deciding
25 whether a conviction violated the Constitution, laws, or treaties
26 of the United States." *Estelle v. McGuire*, 502 U.S. 62, 68 (1991).
27 Therefore, as a general rule, federal courts may not review a trial
28 court's evidentiary rulings. *Crane v. Kentucky*, 476 U.S. 683, 689

1 (1986). A state court's evidentiary ruling, even if erroneous, is
2 grounds for federal habeas relief only if it is so fundamentally
3 unfair as to violate due process. *Dillard v. Roe*, 244 F.3d 758,
4 766 (9th Cir. 2001); see also *Windham v. Merkle*, 163 F.3d 1092,
5 1103 (9th Cir. 1998) (The federal court's "role is limited to
6 determining whether the admission of evidence rendered the trial
7 so fundamentally unfair as to violate due process."). Habeas relief
8 is thus available only if an evidentiary ruling or rule was
9 arbitrary, disproportionate to the end it was asserted to promote,
10 or so prejudicial that it rendered the trial fundamentally unfair.
11 See *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006); *Walters v.*
12 *Maass*, 45 F.3d 1355, 1357 (9th Cir.1995).

13 Petitioner is entitled to habeas relief only if the error has
14 a "substantial and injurious effect or influence in determining
15 the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 627, 637
16 (1993).

17 As previously discussed, the Nevada Supreme Court addressed
18 this claim by holding that admission of Heather's testimony, even
19 if improper, "would amount to harmless error, since both Marilyn
20 and Michele provided sufficient credible evidence to support
21 Howard's convictions." (Ex. 80 at 11). For the same reasons as
22 discussed in Ground One, Howard is not entitled to relief on this
23 ground of the petition. The Nevada Supreme Court was not
24 objectively unreasonable in finding any error, it if was error, to
25 be harmless given the strength of the evidence against Howard.
26 Howard is not therefore entitled to relief on Ground Two.

27
28

1 **C. Ground Three**

2 In Ground Three, Howard asserts that several of the
3 prosecutor's statements amounted to misconduct and that the
4 statements, individually and cumulatively, violated his rights to
5 due process and a fair trial. (ECF No. 21 at 21).

6 A defendant's constitutional right to due process of law is
7 violated if the prosecutor's misconduct renders a trial
8 "fundamentally unfair"; thus, a prosecutor's improper comments
9 amount to a constitutional violation if they "so infected the trial
10 with unfairness as to make the resulting conviction a denial of
11 due process." *Darden v. Wainwright*, 477 U.S. 168, 181-83 (1986).
12 However, even if there was a constitutional violation, a petitioner
13 is entitled to relief only if he was actually prejudiced by the
14 comments. *Id.* (citing *Ayala*, 135 S. Ct. at 2197, and *Brecht*, 507
15 U.S. at 627, 637). Comments cause actual prejudice if they had a
16 "substantial and injurious effect or influence on the jury's
17 verdict." *Wood v. Ryan*, 693 F.3d 1104, 1113 (9th Cir. 2012). "Under
18 this test, relief is proper only if the federal court has 'grave
19 doubt about whether a trial error of federal law had 'substantial
20 and injurious effect or influence in determining the jury's
21 verdict.'" *Ayala*, 135 S. Ct. at 2197-98.

22 Claims of prosecutorial misconduct are reviewed "on the
23 merits, examining the entire proceedings to determine whether the
24 prosecutor's [actions] so infected the trial with unfairness as to
25 make the resulting conviction a denial of due process." *Johnson v.*
26 *Sublett*, 63 F.3d 926, 929 (9th Cir. 1995) (citation and internal
27 quotation marks omitted). The Supreme Court has looked at the
28 following factors: (1) whether the prosecutor's comments

1 manipulated or misstated the evidence; (2) whether the trial court
2 gave a curative instruction; (3) the weight of the evidence against
3 the accused. *Darden*, 477 U.S. at 181-82.

4 Howard first asserts that the prosecutor improperly referred
5 to his defense theory as a "lie." This statement occurred when
6 the prosecutor was discussing what Howard intended with respect to
7 Marilyn and Michele. She stated:

8 That's what you have to consider with regard to intent.
9 That is the reason that Heather B. was here to testify,
10 because if it was the intent of him to just pick up some
11 girls and have a good time and possibly these were
12 prostitutes, that's a lie by the fact he approached her
13 at Virginia Lake.

14 (Ex. 136 at 195). The Nevada Supreme Court addressed Howard's claim
15 as follows:

16 Howard argues that the prosecutor engaged in misconduct
17 by making numerous prejudicial comments during the
18 State's closing argument. . . . Some of the alleged
19 prosecutorial misconduct that Howard challenges on
20 appeal was not objected to at trial. . . .

21 The unobjected-to comments that Howard now asserts
22 amounted to prosecutorial misconduct occurred when the
23 prosecutor: (1) characterized the defense as a lie. . .
24 .

25 Generally, failure to object precludes appellate review
26 unless the error is plain error. *Valdez v. State*, 124
27 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). Under plain
28 error review, reversal is not warranted unless "the
defendant demonstrates that the error affected his or
her substantial rights, by causing actual prejudice or
a miscarriage of justice. *Id.* (internal quotations
omitted). Howard has failed to demonstrate how the
unobjected-to comments substantially prejudiced him or
caused a miscarriage of justice. Since these particular
comments do not constitute plain error, reversal is not
warranted.

(Ex. 80 at 11-12 & n.5).

Respondents argue that (1) the prosecutor's comment can be
read as intending to state that Howard's position was "belied" by

1 the fact he approached Heather, and (2) even if the passing
2 reference was improper, it did not so fatally infect the trial
3 with unfairness to be a violation of due process.

4 While the prosecutor may have *intended* to use the word
5 "belied," the word she actually used was "lie." The prosecutor
6 therefore called Howard's defense a lie. However, even assuming
7 such a statement amounted to misconduct, the error would be subject
8 to harmless error analysis, *Crane*, 476 U.S. at 691, meaning that
9 Howard would be entitled to habeas relief only if it had a
10 "substantial and injurious effect or influence in determining the
11 jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 627, 637
12 (1993)). The evidence against Howard was extremely strong, so
13 strong that the court cannot find the state courts were objectively
14 unreasonable in concluding that this isolated remark by the
15 prosecutor did not impact the jury's verdict in any substantial
16 way. Howard is not therefore entitled to relief on sub-part one
17 of Ground Three.

18 Second, Howard asserts that the State improperly vouched for
19 Marilyn by saying she "didn't like to tell her story" and that she
20 "can't remember a lot of what" Howard said to her while she was in
21 the gas station. (ECF No. 21 at 22). The district court upheld the
22 objection to the second statement and instructed the prosecutor to
23 rephrase, which she did. The Nevada Supreme Court addressed this
24 claim as follows:

25 Errors properly preserved for appellate review are
26 reviewed for harmless error. *Id.* Valdez states:

27 The proper standard of harmless-error
28 review depends on whether the prosecutorial
misconduct is of a constitutional dimension.
If the error is of constitutional dimension,

1 then we . . . will reverse unless the State
2 demonstrates, beyond a reasonable doubt, that
3 the error did not contribute to the verdict.
4 If the error is not of constitutional
5 dimension, we will reverse only if the error
6 substantially affects the jury's verdict.

7 Id. at 1188-89, 196 P.3d at 476 (footnotes omitted).

8 Howard first asserts that the prosecutor improperly
9 commented that Marilyn did not like being a witness and
10 telling her story. We conclude that this statement was
11 a fair comment on the evidence because the prosecutor
12 was pointing out Marilyn's demeanor as a witness, rather
13 than asserting a personal belief. A prosecutor is
14 allowed to express opinions and beliefs during closing
15 argument so long as the statements made are fair comments
16 on the evidence presented to the jury. Domingues v.
17 State, 112 Nev. 683, 696, 917 P.2d 1364, 1373 (1996).

18 Howard next asserts that the prosecutor improperly
19 vouched for Marilyn's testimony when she made the
20 following statement:

21 Now, the idea that Marilyn said, Well, he
22 just stood there in the doorway, and Mr. Verma
23 said, Well he was sort of beckoning her and
24 saying rude things, Marilyn can't remember a
25 lot of what he said. I-I asked her -

26 "Vouching may occur in two ways: the prosecution may
27 place the prestige of the government behind the witness
28 or may indicate that information not presented to the
29 jury supports the witness's testimony." Lisle v. State,
30 113 Nev. 540, 553, 937 P.2d 473, 481 (1997) (internal
31 quotations omitted). It is unclear from Howard's
32 argument what part of the prosecutor's comment he
33 believes amounted to vouching. Assuming he meant to
34 concentrate on the phrase "Marilyn can't remember a lot
35 of what he said," this is also a fair comment on the
36 evidence and not tantamount to vouching. Further, even
37 if it were somehow vouching, in light of the overwhelming
38 evidence supporting Howard's conviction, we conclude
39 that this statement did not "substantially affect[] the
40 jury's verdict." See Valdez, 124 Nev. at 1189, 196 P.3d
41 at 476.

42 (Ex. 80 at 12-13).

43 The state courts were not objectively unreasonable in
44 concluding that the prosecutor's statements did not amount to
45 vouching and that, even if they were vouching, they were harmless.
46 It is clear from Marilyn's testimony that she had difficulty

1 remembering things. And it is a fair reading of the testimony that
2 she did not like to tell her story. The state courts were not
3 therefore objectively unreasonable in concluding that the
4 prosecutor's comments were a fair comment on the evidence.
5 Moreover, the evidence against Howard was very strong, and it is
6 unlikely that these comments had a substantial and injurious effect
7 on the jury's verdict. Howard is not therefore entitled to relief
8 on sub-part two of Ground Three.

9 Third, Howard asserts the prosecutor relied on facts not in
10 evidence when she made statements about the effect of Marilyn's
11 medications and when she said Marilyn was the type of person one
12 would pick to victimize. (Ex. 136 (Tr. 127-29)). The prosecutor
13 stated:

14 And you heard that the medication she's on is twofold.
15 I think it was Abilify and Celexa. I can't remember off
16 the top of my head. But she did tell you that what it
does is it levels her out and keeps her level.

17 So if she has a flat affect and she doesn't sound like
18 she's hysterical on the 911 call, you can hear her go up
and down in her voice because she's getting frustrated,
19 but she's on medication and it keeps her at that level,
and it does it because there's a reason for that.

20

21 She is who you would pick out if you were going down the
street and looking for someone to victimize, the kind of
22 person you would pick out, because of her size, her
demeanor, and her inability to sort of be effective in
23 communicating with people. And what are the chances of
someone like that coming to court and actually
24 testifying, which she did in this case.

25 So if you're on the street and you're looking for a
victim, that's sort of someone who you want to find;
26 someone who you know you can victimize easily.

27 (Ex. 136 (Tr. 128-29)).
28

1 The Nevada Supreme Court found no prejudice or miscarriage of
2 justice on the basis of the prosecutor's statements. (Ex. 80 at
3 11-12 & n.5). Respondents assert that the Nevada Supreme Court's
4 conclusion was objectively reasonable because the prosecutor's
5 statements were a fair comment on the evidence.

6 The state court's rejection of this claim was not contrary
7 to, or an unreasonable application of, clearly established federal
8 law. Initially, the court would point out that Marilyn testified
9 she is bipolar, suffering from anxiety, depression, and panic
10 attacks, and was on two medications to calm her down. (Ex. 132
11 (Tr. 211-13)). She also testified that, as a result of her mental
12 condition, she has difficulty communicating with people,
13 explaining and understanding things, and that she often gets
14 frustrated. (*Id.* at 213). In light of this testimony, at least as
15 to the first objection, the prosecutor's statement was based on
16 facts in evidence and was not improper. The second objected-to
17 statement encompassed both things Marilyn testified to and facts
18 that the jury could observe. The prosecutor's statements on those
19 facts were also fair commentary on the evidence.

20 Further, regardless of the propriety of either statement, it
21 was not unreasonable for the state courts to conclude they did not
22 prejudice Howard. As previously noted, the evidence against Howard
23 was extremely strong. It is unlikely that the prosecutor's
24 statements in this regard had any real effect on the jury's
25 verdict. Howard is not entitled to relief on sub-part three of
26 Ground Three.

27 Fourth, Howard asserts the prosecutor inappropriately
28 personalized the case several times, including when she stated:

1 (1) "I take issue with a couple of things that were represented,"
2 (Ex. 136 (Tr. 186)); (2) "I don't need to prove a sexual assault
3 with Marilyn at the Ponderosa. The sexual assault I need to prove
4 is the fellatio that occurred at the XXX parking lot," (*id.* at
5 189), and (3) "my sexual assault charge," (*id.* at 190). After the
6 last comment, the prosecutor was admonished to restate, and she
7 corrected her statement to the "the State's charges."

8 The Nevada Supreme Court found no prejudice or miscarriage of
9 justice on the basis of the prosecutor's statements. (Ex. 80 at
10 11-12 & n.5). The state courts' conclusion was not contrary to, or
11 an unreasonable application of clearly established federal law or
12 an unreasonable determination of the facts. Given the strength of
13 the evidence against Howard, it was not objectively unreasonable
14 for the state courts to conclude that the prosecutor's statements
15 did not have a substantial and injurious effect on the jury's
16 verdict. Howard is not entitled to relief on this part of the
17 Ground Three.

18 Fifth, Howard argues that the prosecutor tried to inflame the
19 jury's passions by telling them to put themselves in Michele's
20 shoes. Howard cites to the following statement:

21 No, as he's doing this, the situation is escalating, and
22 she's not sure what to make of this: Is this guy serious?
23 Because you don't really expect when you're leaving your
24 friend's house on a regular day, walking down the street
25 on a beautiful July day, that some guy's really going to
pick you up and then try to assault you. You're thinking:
What's going on here? And your red flags are going off,
but you're not sure how to take it, and then you're not
sure what you're going to do about it.

26 (Ex. 136 (Tr. 135-36)). The Nevada Supreme Court found no prejudice
27 or miscarriage of justice on the basis of the prosecutor's
28 statements. (Ex. 80 at 11-12 & n.5).

1 The state court's conclusion was not contrary to, or an
2 unreasonable application of, clearly established federal law, or
3 an unreasonable determination of the facts. Given the strength of
4 the evidence against Howard, it was not objectively unreasonable
5 to conclude that Howard suffered no prejudice from the comments.
6 Howard is not entitled to relief on sub-part five of Ground Three.

7 Sixth, Howard asserts that the prosecutor made a series of
8 additional improper statements to which defense counsel objected.
9 Howard merely cites a four-page span, however, without identifying
10 which of several objected-to statements violated his rights, or
11 how. The court agrees with respondents that to this extent Ground
12 Three is insufficiently pled and relief cannot be granted on such
13 conclusory claims. Howard is not entitled to relief on sub-part
14 six of Ground Three.

15 Finally, Howard argues that the prosecutor's statements,
16 cumulatively, rose to the level of a due process violation. The
17 court has considered the cumulative effect of the prosecutor's
18 statements and concludes that, in light of the strong evidence
19 against Howard, whatever error there was in the prosecutor's
20 statements, they did not have a substantial and injurious effect
21 on the jury's verdict -- even cumulatively.

22 Howard has not established entitlement to relief under any
23 part of Ground Three of the petition.

24 **IV. Motion for Evidentiary Hearing**

25 Howard has filed a motion for an evidentiary hearing on the
26 question of deficient performance with respect to the ineffective
27 assistance of counsel claim in Ground One. (ECF No. 60). Because
28 the court resolves Ground One on the basis of prejudice, it does

1 not reach the question of performance, and an evidentiary hearing
2 is unnecessary. The motion for evidentiary hearing is therefore
3 denied.

4 **V. Certificate of Appealability**

5 In order to proceed with an appeal, Howard must receive a
6 certificate of appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App.
7 P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951
8 (9th Cir. 2006); see also *United States v. Mikels*, 236 F.3d 550,
9 551-52 (9th Cir. 2001). Generally, a petitioner must make "a
10 substantial showing of the denial of a constitutional right" to
11 warrant a certificate of appealability. *Allen*, 435 F.3d at 951; 28
12 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84
13 (2000). "The petitioner must demonstrate that reasonable jurists
14 would find the district court's assessment of the constitutional
15 claims debatable or wrong." *Allen*, 435 F.3d at 951 (quoting *Slack*,
16 529 U.S. at 484). In order to meet this threshold inquiry, Howard
17 has the burden of demonstrating that the issues are debatable among
18 jurists of reason; that a court could resolve the issues
19 differently; or that the questions are adequate to deserve
20 encouragement to proceed further. *Id.*

21 The court has considered the issues raised by Howard, with
22 respect to whether they satisfy the standard for issuance of a
23 certificate of appealability, and determines that none meet that
24 standard. Accordingly, Howard will be denied a certificate of
25 appealability.

1 **VI. Conclusion**

2 In accordance with the foregoing, IT IS THEREFORE ORDERED
3 that the amended petition for writ of habeas corpus (ECF No. 21)
4 is DENIED, and this action is therefore DISMISSED WITH PREJUDICE.


5 IT IS FURTHER ORDERED that Howard's motion for an evidentiary
6 hearing (ECF No. 60) is DENIED.

7 IT IS FURTHER ORDERED that Howard is DENIED a certificate of
8 appealability, for the reasons set forth above.

9 The Clerk of Court shall enter final judgment accordingly and
10 CLOSE this case.

11 IT IS SO ORDERED.

12 DATED: This 12th day of February, 2020.

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15 UNITED STATES DISTRICT JUDGE
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